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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

UNITED STATES OF AMERICA,

Petitioner,

—v.—

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTHERN CALIFORNIA, THE ACLU OF SOUTHERN CALIFORNIA, AND THE ACLU OF SAN DIEGO AND IMPERIAL COUNTIES, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has three regional affiliates in the State of California: the ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties. All three California affiliates of the ACLU supported passage of the medical marijuana initiative, Proposition 215, which led directly to the events giving rise to this litigation. More generally, the ACLU has participated in numerous cases before this Court, both as direct counsel and as *amicus curiae,* to defend the principle that the war on drugs should not be pursued at the expense of traditional legal and constitutional safeguards designed to restrain the government from overreaching in its law enforcement efforts. The proper resolution of this case is therefore a matter of substantial importance to the ACLU and its members throughout the country.

STATEMENT OF THE CASE

On November 5, 1996, the people of California passed Proposition 215, the "Compassionate Use Act of 1996." *See* Cal. Health & Safety Code §11362.5. It is now state law that "seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana." *Id.* at §11362.5(b)(1)(A).

Following passage of Proposition 215, the Oakland Cannabis Buyers' Cooperative ("OCBC") organized a dispensary to provide patients a safe and affordable source of marijuana for medical use. On July 28, 1998, the City of Oakland ("the City"), acting in order "to recognize and protect the rights of patients," and acknowledging the need for "safe and affordable medical cannabis," passed an ordinance establishing a Medical Cannabis Distribution Program. J.A. 139. On August 11, 1998, the City designated OCBC to administer the program. J.A.141, 145.

Reacting to the California proposition and to similar ballot initiatives in other states, the United States filed suit against OCBC on January 9, 1998. The federal government argued that even though California voters have altered state law to permit the use of marijuana for medical purposes, California voters cannot change the fact that the manufacture or distribution of marijuana is illegal under the federal Controlled Substances Act ("CSA"). *See* 21 U.S.C. §841(a)(1).

Instead of seeking to enforce federal law in the usual way -- by criminally prosecuting OCBC before a jury -- the United States asked the district court to pursue the highly unusual course of prohibiting OCBC from continuing its activities. It did so under a rarely used provision of the CSA that empowers federal prosecutors to circumvent ordinary criminal procedures by requesting instead a prospective injunction against illegal activity. *See* 21 U.S.C. §882.[2]

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[2] Section 882 provides, in full:

(continued...)

On May 19, 1998, the district court preliminarily enjoined OCBC from violating the CSA. *See United States v. Cannabis Cultivators Club*, 5 F.Supp.2d 1086, 1106 (N.D. Cal. 1998). The court expressed doubt regarding the validity of a necessity defense, but deferred any definitive ruling on that issue, reasoning that if and when the federal government alleged that OCBC had violated the injunction, OCBC could raise the necessity defense in a contempt proceeding. *See id.* at 1102.

OCBC was in fact subsequently held in contempt. *See United States v. Cannabis Cultivators Club*, No. 98-00088, slip op. at 12 (N.D. Cal. Oct. 13, 1998). In the contempt proceeding, the court denied OCBC's request for a jury trial notwithstanding §882(b), observing that "this is not a criminal proceeding in which a defendant is entitled to a jury trial even if there are no disputes of fact," *id.*, and noting the applicability of judgment as a matter of law under Fed.R. Civ.P. 50, a procedure not available in a criminal trial. *Id.* It also applied a "clear and convincing" burden of proof, not the more demanding "beyond a reasonable doubt" standard that would have applied in a criminal prosecution. *See id.*

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[2] (...continued)

(a) Jurisdiction

The district courts of the United States and all courts exercising general jurisdiction in the territories and possessions of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this subchapter.

(b) Jury trial

In case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury in accordance with the Federal Rules of Civil Procedure.

Finally, the court granted the government's motion to exclude the medical necessity defense from the contempt proceedings, on the ground that OCBC had not presented sufficient evidence of necessity. *See id.* at 7-8.

Three days later, the district court denied OCBC's motion to modify the injunction to allow the provision of marijuana to patients who have no alternative to cannabis for the treatment of the most serious illnesses. *See United States v. Cannabis Cultivators Club*, No. 98-00088, slip op. at 2 (N.D. Cal. Oct. 16, 1998).[3]

On appeal, the Ninth Circuit reviewed the district court's ruling on OCBC's motion to modify the injunction. *See United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1111 (9th Cir. 1999)("*OCBC*").[4] The Ninth Circuit remanded for reconsideration of the district court's denial of the motion to modify the injunction, holding that the district court had erred in concluding that it "lacked the power to make the requested modification." *Id.* at 1114. The Ninth Circuit quoted the district court's October 13, 1998 ruling, in which the trial court explained that it had no power to circumscribe the injunction once it found a statutory violation:

> The Court understands [OCBC's] argument that in this action the Court is sitting in equity and

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[3] In reaction to the federal government shutdown of OCBC, the City of Oakland has declared a public health emergency. J.A.147-51. The City expressed concern that "the closure of [OCBC] will cause pain and suffering to seriously ill Oakland residents." J.A.149. The Oakland City Council has renewed that resolution every two weeks. *See, e.g.*, J.A. 152-57.

[4] OCBC's appeal from the contempt order was deemed moot because OCBC had purged the contempt by agreeing to comply with the injunction. 190 F.3d at 1113.

> therefore must consider the human suffering that will be caused by [the government's] success in closing down the OCBC. While the Court is sitting in equity, however, its equitable powers do not permit it to ignore federal law. Federal law prohibits the distribution of marijuana to seriously ill persons for their personal medical use.

See Cannabis Cultivators Club, slip op. at 13 (N.D. Cal. Oct. 13, 1998)(quoted in part by *OCBC*, 190 F.3d at 1114). The court of appeals ruled that the district court did not lose the power under §882 to refuse to enjoin a particular group of people whenever it found a violation of the CSA. On the contrary, "there is no evidence that Congress intended to divest the district court of its broad equitable discretion." *OCBC*, 190 F.3d at 1114. Moreover, the court of appeals found that the district court not only has the *power* to consider the pain and suffering of a group, but it has the *duty* to do so as part of its equitable inquiry into the public interest. *See id.* To be sure, the court of appeals also touched on the medical necessity defense. *See id.* It concluded that the district court could consider, as *part* of its equitable calculus, that a "legally cognizable defense" would have been available to OCBC if the government had chosen to use the normal criminal processes. *Id.* But in none of the judgments on review here did the district court or the court of appeals ever rule on the validity of the legal necessity defense under the CSA. Instead, the court of appeals remanded so the district court could exercise its power to consider the full range of equities.

On remand, the OCBC renewed its motion to modify the injunction. The district court granted the motion after balancing the equities, as instructed by the court of appeals. *See United States v. Oakland Cannabis Buyers' Coop.*, No. 98-00088, slip op. at 1 (N.D. Cal. July 17, 2000). This

Court subsequently stayed the district court's order "pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit and further order of this Court." *See United States v. Oakland Cannabis Buyers' Coop.*, __ U.S. __, 121 S.Ct. 21-22 (2000). Before the Ninth Circuit reviewed the district court's modification, this Court granted *certiorari* to review the Ninth Circuit's initial opinion. *See United States v. Oakland Cannabis Buyers' Coop.*, __ U.S. __, 121 S.Ct. 563 (2000).

SUMMARY OF ARGUMENT

Notwithstanding the government's question presented, the validity of a medical necessity defense for marijuana distribution is not properly before this Court. In our view, the *only* issue actually and necessarily presented for review is the following: Does §882, the provision of the Controlled Substances Act that grants jurisdiction to enjoin statutory violations, strip all discretion from the district court, requiring it to automatically issue an injunction whenever the United States demonstrates a violation of the CSA? Or, as the plain language of the statute indicates and the principles of equity counsel, does the district court retain discretion to shape an injunction to account for all of the factors that traditionally influence the exercise of equity, including hardship to the parties (both factual and legal), the public interest, the efficacy of the proposed injunction, and any potential defenses? The district court concluded that once it found a *prima facie* violation of the CSA, it lost all power to deny or even limit an injunction. *See Cannabis Cultivators Club*, slip op. at 13 (N.D. Cal. Oct. 13, 1998). The propriety of this narrow holding is all that was reviewed by the Ninth Circuit, and all that is before this Court.

The United States urges this Court to ignore the actual holding of the Ninth Circuit and instead to issue a preemp-

tive ruling that congressional placement of marijuana in Schedule I of the CSA precludes a necessity defense.[5] The government's interpretation of the interplay between the CSA and common law defenses is wrong for the reasons stated in respondents' brief. But the analytical approach pressed by the United States carries a separate, important danger: It invites this Court to overturn longstanding jurisprudence concerning injunctions against criminal acts.

Significantly, the United States pays no heed to the actual words of 21 U.S.C. §882(a), which provide that the district court "shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations" of the CSA. Under the plain language of that section, the district court, sitting as chancellor, retains discretion to refuse to enjoin an activity or to partially enjoin an activity, even if that activity violates the statute. In making this determination, the court may of course consider

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[5] Because that issue was not resolved by either court below, the most appropriate disposition may be to dismiss the writ of *certiorari* as improvidently granted. This would allow the lower courts to consider the validity of the necessity defense in the particular context of this case in due course on remand. As described above, the district court held, in a ruling not being reviewed here (because it was part of the contempt proceeding later found moot), only that OCBC had presented insufficient facts to assert the medical necessity defense. *See Cannabis Cultivators Club*, slip op. at 7-8 (N.D. Cal. Oct. 13, 1998). The Ninth Circuit characterized the medical necessity defense as "legally cognizable," which it surely is in the abstract, but never separately addressed the significance of the Schedule I listing, presumably because it was sending the case back to the district court to allow the district court to exercise its discretionary judgment. *See OCBC*, 190 F.3d at 1114. While the government is free to present any question it wants for review, this Court has traditionally refrained from deciding important legal questions on such a barren record. *See National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999)("[W]e do not decide in the first instance issues not decided below").

-- indeed, *must* credit -- the harm that might result to critically ill patients who have no alternative to using cannabis under a doctor's supervision. This Court has construed similar provisions of other statutes to preserve equity's traditional discretion, even after finding a statutory violation.

Properly read, therefore, §882 leaves intact the district court's discretion to craft an injunction that forbids marijuana distribution to moderately ill patients, while not enjoining distribution to more seriously ill patients, entirely apart from the validity of a medical necessity defense. As a matter of proportionality and balancing of hardship, a district court could well deem it appropriate that, for more seriously ill patients, the government should be held to its normal avenue of criminal prosecution. The United States thus misses the mark when it says that striking down the necessity defense for marijuana use resolves this case. This Court can reverse the decision under review here only upon finding that §882, despite its plain language, entirely eliminates the district court's discretion to consider a request for injunctive relief.

Several compelling considerations support that conclusion. First, nothing in the CSA precludes the district court from exercising its equitable discretion to account for patients' strong medical interest in avoiding physical suffering. Members of this Court, as well as a growing consensus of commentators, have recognized that seriously ill patients have a liberty interest in adequate palliative care. The district court should have recognized its ability under the statute to consider the strength of this interest in shaping its injunction.

Second, courts of equity have historically been loathe to allow the government to circumvent the due process safeguards required in a criminal prosecution by seeking to prohibit allegedly criminal behavior through a civil injunction, which could later enforced through civil contempt proceed-

ings. The reason behind that hesitance is illustrated by the facts of this case. If the district court's original injunction were allowed to stand, any future contempt proceeding would be conducted before a civil jury. *See* 21 U.S.C. §882(b). Members of OCBC who are found to have violated the injunction could then be imprisoned (albeit as a civil penalty) without a criminal trial's basic protections, including: the right to counsel, the right to present a defense, the presumption of innocence unless guilt is proven beyond a reasonable doubt, the right to confront witnesses, etc. And this assumes that a judgment of contempt is not entered before trial -- as the contempt order in this case was -- using one of the procedural devices available only in civil cases. Absent a clear statement from Congress restricting the chancellor's traditional discretion, which §882 plainly lacks, it is entirely appropriate for a court of equity to consider the impact of these diminished procedural safeguards when it decides whether an injunction should issue and how broad it should be.

Finally, the district court erred when it assumed that a medical necessity defense could automatically be raised in a subsequent contempt hearing. To the best of our knowledge, no federal court has ever allowed a necessity defense in any contempt proceeding, whether criminal or civil. Thus, the district court should have considered, as part of its equitable calculus, the possibility that a medical necessity defense could only be raised in a criminal prosecution. It need not have decided whether such a defense existed, and neither must this Court. As a court of equity, however, it should have weighed the fact that enjoining those in dire medical need might well deprive them of a substantive defense that would be available to them in a criminal prosecution.

ARGUMENT

I. THE PLAIN LANGUAGE OF §882 GIVES THE DISTRICT COURT EQUITABLE DISCRETION TO SHAPE OR LIMIT AN INJUNCTION AGAINST USE OF MARIJUANA BY PATIENTS WHO HAVE NO ALTERNATIVE FOR TREATING SERIOUS ILLNESS

Section 882 provides that the district court "shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this subchapter." 21 U.S.C. §882. The text of this provision merely *authorizes* the court to provide injunctive relief. Nowhere does the section eliminate or constrain the longstanding latitude afforded to courts in the exercise of their equitable jurisdiction, and it certainly does not *require* the court to enjoin all conduct found to violate the CSA.

"The starting point in interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993)(internal quotation marks omitted); *see also Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 30 n.12 (1981)(Stevens, J., concurring in part) ("the 'plain language' rule of statutory construction . . . has dominated our recent statutory decisions"). To prevail on the plain language of the statute, therefore, the government must argue that the phrase "shall have jurisdiction" in §882 means not only that the court has equitable power to issue an injunction, but that it must mechanically do so in all circumstances. The government's argument, however, has less to do with the actual wording of §882 than with the "subordination of explicit . . . text to currently favored public policy." *Maryland v. Craig*, 497 U.S. 836, 861 (1990)(Scalia, J., dissenting). In our view, therefore, this Court's in-

quiry should end with a finding that the court of appeals correctly instructed the district court that it had discretion, based on equitable considerations, to refuse to enjoin the OCBC from distributing marijuana to those in dire medical need.[6]

The legislative history, to the extent that it is relevant, fully supports that conclusion. Congressional statements explaining §882 confirm what is obvious from the text of the statute: that the provision merely "*authorizes* U.S. courts to issue injunctions against violators of [the CSA]." H.R. Rep. No. 1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 1970 WL 5971, at *132 (emphasis added). In short, §882 confers equitable authority on the district court that is permissive, not mandatory.

Section 882 and the latitude it affords are in no way anomalous: Courts have interpreted numerous similarly worded statutes according to their plain language to preserve judicial discretion to shape a statutory injunction according to equity, rather than reading them to require rote issuance of a sweeping injunction against all activity that violates the statute. For example, §17 of the Fair Labor Standards Act ("FLSA") provides that "[t]he district courts . . . shall have jurisdiction, for cause shown, to restrain violations of . . . this title." 29 U.S.C. §217. Construing this provision, this Court noted that even where a violation of the FLSA was all but established, "it will still be within the discretion of the

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[6] The district court concluded that it had no discretion under §882. *See Cannabis Cultivators Club*, slip op. at 13 (N.D. Cal. Oct. 13, 1998) ("While the Court is sitting in equity, its equitable powers do not permit it to ignore federal law"). As explained above, the Ninth Circuit remanded, not with explicit instructions that the injunction must be modified, but rather to correct the district court's misapprehension and allow it to exercise its equitable discretion as permitted under §882. *See OCBC*, 190 F.3d at 1115.

District Court whether or not to issue an injunction." *Mitchell v. Lublin, McGaughy, & Assocs.*, 358 U.S. 207, 215 (1959); *see also Martin v. Coventry Fire Dist.*, 981 F.2d 1358, 1362 (1st Cir. 1992)(Breyer, C.J.)(allowing the district court to refuse to enjoin a violation of the FLSA, based on a consideration of the equities); *Brennan v. Saghatelian*, 514 F.2d 619, 621-22 (9th Cir. 1975)(same); *Mitchell v. Hodges Contracting Co.*, 238 F.2d 380, 381 (5th Cir. 1956)(same). In a case strikingly similar to the present matter, the court of appeals reversed a district court's broad injunction, issued under the mistaken belief that it lacked the power to refuse equitable relief once it found a violation of the FLSA. *See Schultz v. Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1271 (10th Cir. 1970). In just the same way, the district court here mistakenly thought it was compelled to issue an injunction because "its equitable powers do not permit it to ignore federal law." *OCBC*, 190 F.3d at 1114 (quoting district court order).

In a similar vein, the Court in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), construed the closely analogous language of §27 of the Securities Act of 1934, 15 U.S.C. §78aa, to mean that "nothing in the statutory policy requires the court to unscramble a corporate transaction merely because a violation occurred. In selecting a remedy the lower courts should exercise the sound discretion which guides the determinations of courts of equity . . . ." 396 U.S. at 386 (internal quotation marks omitted). Moreover, the Court only recently interpreted another similarly worded provision, §505(a) of the Federal Water Pollution Control Act, 33 U.S.C. §1365(a), to mean that "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000)(internal quotation marks omitted); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)

(acting under §1365(a) and holding that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances"); *NRDC v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 937-41 (3d Cir. 1990)(construing §1365(a)); *United States v. Article of Drug*, 362 F.2d 923, 928 (3d Cir. 1966)(construing the injunction provision of the Federal Food Drug and Cosmetic Act, 21 U.S.C. §332(a)).

The government here argues that §882 requires the district court to automatically enter an injunction, regardless of any equitable inquiry into the public interest, once it finds that the OCBC's activity violates the CSA. The government assumes that the OCBC could have no possible defense for its actions, a leap of logic that OCBC strongly disputes. But even if the necessity defense were to have no application here, the sole fact that certain activity violates a statute could not override a court's duty to balance the range of equities in deciding whether to issue an injunction. Section 882 grants jurisdiction to enjoin statutory violations; it does not command the district court to do so. *See Miller v. California Pac. Med. Ctr.*, 991 F.2d 536 (9th Cir. 1993)(Kozinski, J.)(construing the injunction provision of the National Labor Relations Act, 29 U.S.C. §160(j)), *aff'd upon reh'g en banc*, 19 F.3d 449, 457 (1994).

In *Miller*, the court rejected, in an analogous context, the argument that the government is making here. The *Miller* court held explicitly that the NLRA provision granting "jurisdiction" to temporarily enjoin unfair labor practices did not alter the "fundamental principle that an injunction is an equitable remedy that does not issue as of course." 991 F.2d. at 539 (internal quotation marks omitted). The Ninth Circuit expressed understanding that courts must consider the public interest when exercising their discretion to enter an injunction. But it also recognized that mere recitation of the statutory purpose does not automatically settle the public

interest inquiry. *See id.* at 540-41. Otherwise, an injunction would automatically issue whenever the court found a statutory violation -- a rule that all of the cases cited above, which construe similar statutes, have explicitly rejected. The *Miller* court acknowledged that an injunction must be consistent with statutory policies, as the government argues here, but emphatically concluded that "none of this contradicts the fundamental principle that injunctions are equitable in nature and should only issue when supported by the equities." *Id.* at 540. Nothing in the similar jurisdiction-granting language of §882 compels the conclusion that a court of equity must automatically enter an injunction upon finding a statutory violation.[7]

Moreover, even where the provision's language is far more mandatory than that of §882, this Court has interpreted law enforcement injunction provisions to allow full discretion not to enjoin statutory violations. For instance, §205(a) of the Emergency Price Control Act provides that "upon a showing" of current or imminent violation, equitable relief "*shall* be granted." 50 U.S.C.A. App. §925(a) (emphasis added)(quoted in *Hecht Co. v. Bowles*, 321 U.S. 321, 321 (1944)). Despite that obligatory phrasing, the Court con-

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[7] Likewise, nothing in *United States v. Rutherford*, 442 U.S. 544 (1979), suggests that an injunction against OCBC must automatically issue. *See* Pet.Br. at 44-45. The circumstances of that case were entirely different. There, terminally ill cancer patients asked the court to enjoin the *government* from interfering in any way with distribution of the drug Laetrile. Such an injunction would have prevented the government from taking *any* steps to prevent use of the drug by such patients. Here, by contrast, the government is asking the court to enjoin OCBC from distributing cannabis to *patients*. Nothing prevents the government from pursuing a criminal prosecution against OCBC for distributing marijuana to patients in dire medical need if distribution to those patients were excluded from the injunction. Because the government has a viable alternative at law, the district court has full discretion to exercise its equitable discretion -- and in fact must do so.

cluded that only a more explicit signal would evidence a congressional intent to cabin the traditional discretion of district courts to refuse to enjoin violations of federal law:

> A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

Hecht, 321 U.S. at 329. Not only is there no such clear statement here, but the plain language of §882 is entirely permissive; it contains none of the mandatory terminology included in the statute at issue in *Hecht*.

Provisions granting equitable jurisdiction to enjoin crimes, like the one at issue here, have their historical origins in legislators' desire to overcome the rule that a chancellor has no jurisdiction to enjoin a crime, *see In re Sawyer*, 124 U.S. 200, 210 (1888)(citing *Gee v. Pritchard*, 2 Swanst. 402, 413 (1818)), not any intent to abolish the traditional discretion of a court of equity. Before such jurisdiction-expanding statutes were enacted, courts of equity could enjoin criminal activity only where that activity also endangered property rights or constituted a public nuisance. *See* 124 U.S. at 210; *In re Debs*, 158 U.S. 564, 593-94 (1895)(public nuisance); *Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch. 371, 1817 WL 1582, at *5 (N.Y. Ch. 1817)(property rights); *see also* Harmon Caldwell, "Injunctions Against Crime," 26 Ill.L.Rev. 259, 260-61 (1931); Edwin S. Mack, "The Revival of Criminal Equity," 16 Harv.L. Rev. 389, 392 (1903); Charles Noble Gregory, "Government By Injunction," 11 Harv.L.Rev. 487, 489 (1898). During the nineteenth century, legislatures began to expand the jurisdiction of the chancellor, at first by declaring certain

activities to be nuisances, and then increasingly without reference to the nuisance terminology. *See* 4 John Norton Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE §1349 (5th ed. 1941); "Development in the Law -- Injunction, The Changing Limits of Injunctive Relief," 78 Harv.L.Rev. 997, 1014-15 (1965); Zechariah Chafee, "The Progress of the Law, 1919-20: Equitable Relief Against Torts," 34 Harv.L.Rev. 388, 398-99 (1921). But whether the legislature expanded the definition of nuisance, or simply established an equitable remedy, these jurisdiction-expanding statutes did not oust the other traditional rules of equity. *See* William H. Dunbar, "Government By Injunction," 13 L.Q.Rev. 347, 356-57 (1897). From the outset, statutes that granted "jurisdiction in equity" for law enforcement made injunctive relief "discretionary with the court." Note, "Statutory Extension of Injunctive Law Enforcement," 45 Harv.L.Rev. 1096, 1099, 1100 n.37 (1932). In sum, the historical rationale behind the ancestors of §882 was simply to grant courts of equity jurisdiction over law enforcement, not to restrict equity's traditional discretion to stay its hand.

A. Section 882 Should Be Construed To Allow The District Court To Consider Patients' Strong Interest In Treating Severe Physical Suffering

Perhaps most troubling, the government's reading of §882 -- which strips the district court of all discretion to consider equitable factors -- prevents the district court from considering the hardship to gravely ill patients caused by the government's proposed injunction. Unrelieved physical anguish is no ordinary hardship; indeed this Court's recent cases have recognized patients' important interest in avoiding serious pain, nausea, and other medical suffering.

Patients who suffer from terminal illnesses, or who require medication in order to bear the effects of life-

prolonging treatment, have a strong liberty interest in effective palliative care. For some such patients, marijuana is the only medicine that works. At least in considering whether to grant an injunction -- that is, whether to exercise its equitable powers -- the district court should have recognized its power to consider this interest. A construction of §882 that gives courts such power only bolsters the plain language of that statute.

Members of this Court recognized the fundamental liberty interest in palliative care in *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997). In those cases, the Court held that state statutes banning assisted suicide were facially constitutional. Members of the Court indicated, however, that a liberty interest would exist under more particularized circumstances, where a patient was subjected to unrelieved pain or other suffering due to inadequate palliative medicines. Justice O'Connor, for instance, signed on to the majority opinion only under a specific understanding of the limits of its holding:

> The parties and *amici* agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. In this light, even assuming that we would recognize such an interest, I agree that the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide.

Vacco, 521 U.S. at 736 (O'Connor, J., concurring). In the

final paragraph of her opinion, Justice O'Connor reiterated: "There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths." *Id.* at 737-38. Justice Ginsburg too concurred only in the judgments, noting explicitly that she was doing so "for the reasons stated by Justice O'Connor." *Id.* at 789.

Justice Stevens, concurring only in the judgment, recognized the liberty interest in adequate palliative care even more explicitly than Justice O'Connor:

> Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly at the heart of the liberty to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Id. at 745 (Stevens, J., concurring in the judgment)(internal quotation marks and alterations omitted). Like Justice O'Connor, Justice Stevens thus recognized that circumstances might arise under which patients in serious pain could succeed in a challenge to a statute that barred their access to treatment of that pain. He therefore concluded that a patient with this sort of claim "could prevail in a more particularized challenge." *Id.* at 750.

Writing the majority opinions in *Glucksberg* and *Vacco*, Chief Justice Rehnquist acknowledged the liberty interest in adequate pain treatment highlighted by Justice Stevens. In *Glucksberg*, Chief Justice Rehnquist stated that "a more particularized challenge" might succeed in another circumstance, reiterating only Justice Stevens's point that "such a claim would have to be quite different from the ones advanced by respondents here." *Glucksberg*, 521 U.S. at 735 n.24. Similarly, in *Vacco*, Chief Justice Rehnquist endorsed Justice Stevens's observation that the Court's holding "does

not foreclose the possibility that some applications of the New York statute may impose an intolerable intrusion on the patient's freedom," noting again only that such a claim would require "different and considerably stronger arguments than those advanced by respondents here." *Vacco*, 521 U.S. at 809 n.13 (internal quotation marks omitted).

Justice Breyer, apparently not satisfied with that acknowledgment, also concurred only in the judgment, endorsing Justice O'Connor's articulation of a liberty interest in palliative care. *See id.* at 789. "I believe," he emphasized, "that Justice O'Connor's views, which I share, have greater legal significance than the Court's opinion suggests." *Id.* Strong support could be marshalled for a liberty interest, Justice Breyer argued -- a crucial component of which would be "avoidance of unnecessary and severe physical suffering." *Id.* at 790. He explained:

> Were the legal circumstances different -- for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life -- then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as Justice O'Connor suggests, the Court might have to revisit its conclusions in these cases.

Id. at 792. Justice Souter also acknowledged the importance of receiving adequate treatment for pain, implying that if the states did not adequately address the circumstances surrounding terminal illness, federal intervention might well be warranted. *See Glucksberg*, 521 U.S. at 782. In all, the opinions in *Glucksberg* and *Vacco* lend considerable authority to an individual liberty interest in adequate pain treatment, especially near the end of life, but also by implication

during any serious illness. Government efforts to frustrate such a strong interest should be viewed extremely skeptically, especially by a court sitting in equity.

A growing consensus of commentators has recognized a strong individual interest in adequate palliative care. *See, e.g.*, Jesse H. Choper, "On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences," 19 Cardozo L.Rev. 2259, 2280 (1998); Yale Kamisar, "Physician-Assisted Suicide," 82 Minn.L.Rev. 895, 908-09 (1998); Larry I. Palmer, "Institutional Analysis and Physicians' Rights After *Vacco v. Quill*," 7 Cornell J.L. & Pub. Pol'y 415, 426 (1998); Robert A. Burt, "The Supreme Court Speaks: Not (Yet) Assisted Suicide, But a Constitutional Right to Palliative Care," 337 New Eng. J.Med. 1234 (1997).

The district court in this case rejected a similar argument, but only on the mistaken belief that it had no jurisdiction in equity to consider the interest of dying patients in avoiding intractable suffering. *See Cannabis Cultivators Club*, 5 F.Supp.2d at 1102-03 ("[T]his defense, like the defense of necessity, is inapplicable to this injunction action"). It was exactly this mistaken view of its equity power that the Ninth Circuit rejected, and that this Court should correct with respect to the important interest in being free from pain and in prolonging life under the supervision of a physician. Section 882 cannot be read to exclude automatically such fundamental considerations the moment a court has found a statutory violation. The plain text of the statute preserves the district court's power to decide whether to issue an injunction, even after it has found a violation, and this manifest reading finds ample support in legislative history and the decisions of this Court construing similar provisions in other statutes. Consequently, §882 should be construed in accordance with its plain language to grant the district court the power to exercise its traditional equitable discretion and

to shape its injunction to take into account the fact that some of OCBC's patients are in dire medical need of the only medicine that is able to treat their pain, enable them to endure chemotherapy, and prolong their lives. At bottom, the district court should be allowed to choose between enforcing the CSA through imposition of an injunction against marijuana use or through leaving the government to prosecute patients, with its decision being guided by patients' significant interest in avoiding profoundly debilitating pain and suffering.

B. The District Court Should Be Allowed To Consider The Fact That OCBC Members Who Continue Providing Treatment To Those In Medical Need May Face Imprisonment Without The Benefit Of Criminal Due Process Safeguards

When shaping an injunction, the district court may properly consider the fact that OCBC members may be subject to imprisonment and other severe sanctions if found in contempt, without the due process safeguards that normally accompany criminal prosecution. To be sure, §882(b) provides for a jury trial, but only a civil one -- it does not guarantee the many other protections of criminal procedure, such as the right to appointed counsel, the right to confront witnesses, compulsory process for obtaining witnesses, the right to a speedy and public trial, the right to be indicted by a grand jury, the right against self-incrimination, and the presumption of innocence unless proven guilty beyond a reasonable doubt.

Our point is not that a criminal defendant facing imprisonment for civil contempt under the CSA is entitled to criminal due process protections. *See International Union, United Mineworkers of Am. v. Bagwell*, 512 U.S. 821, 832-34 (1994). To the contrary, it is the very absence of those

protections that a district court may properly take into account in deciding whether and to what extent the government may pursue its law enforcement aims by abandoning criminal prosecution in favor of civil injunction. Certainly, nothing in the language of §882 is inconsistent with that discretion, which is firmly rooted in the history of equity jurisdiction.

As legislatures increasingly authorized injunctions against criminal activity in the late nineteenth century, prominent commentators voiced loud opposition. In their view, the statutes allowed government to pursue exactly the same law enforcement goals as they would have in a criminal prosecution, without having to observe the bothersome requirements of criminal procedure. They coined the phrase "government by injunction" to characterize their protest. *See* Forrest R. Black, "The Expansion of Criminal Equity Under Prohibition," 5 Wisc.L.Rev. 412 (1930); "Recent Cases, Injunctions," 43 Harv.L.Rev. 499 (1930); Edwin S. Mack, "The Revival of Criminal Equity," 16 Harv.L.Rev. at 392; Charles Noble Gregory, "Government By Injunction," 11 Harv.L.Rev. at 489; William H. Dunbar, "Government By Injunction," 13 L.Q.Rev. at 356-57. Following these critiques, cases were brought challenging such statutes on constitutional grounds. Justice Field, then a Justice of the Supreme Judicial Court of Massachusetts, considered one such challenge, involving an injunction against the sale of intoxicating liquors:

> [T]he only effect of the injunction is to subject the respondent to the process used for punishing persons guilty of violating injunctions, in addition to, or in substitution for, criminal process. The legislature apparently thought that a remedy in equity would be more speedy or more certain or more efficient than that by complaint or indictment. The issuing of the in-

> junction of itself adds nothing to the prohibition of the statutes, but the intention plainly is to call into use the peculiar process employed by courts of equity in punishing persons guilty of willful violations of injunctions . . . . Indeed, there are many indications that the principal reason why the statute was passed was to avoid a trial by jury . . . .

Carleton v. Rugg, 22 N.E. 55, 58 (Mass. 1889)(Field, J., dissenting).[8] Despite the protests, criminal equity statutes were almost uniformly held to be constitutional. *See id.* at 57; *see also Eilenbecker v. District Ct. of Plymouth County*, 134 U.S. 31 (1890), overruled in part by *Bloom v. Illinois*, 391 U.S. 194, 195-96 (1968); *Kansas v. Ziebold*, 123 U.S. 623 (1887). *But see Hedden v. Hand*, 107 A. 285 (N.J. 1919).

Nevertheless, Congress responded to the forceful criticism levied at the increasing jurisdiction of criminal equity by passing statutes designed to preserve a criminal jury trial in certain cases. For example, §21 of the Clayton Act, passed by Congress in 1914, provided for a criminal-style jury trial, upon demand of the accused, in all contempt proceedings where violation of an injunction also constituted violation of a criminal law. *See* 18 U.S.C. §402; *see also* Felix Frankfurter & James M. Landis, "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts -- A Study in Separation of Powers," 37 Harv.L.Rev. 1010, 1039-58 (1924)(discussing the origins of §21 of the

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[8] Here, too, federal prosecutors evidently wished to avoid a jury comprised of California voters who had only recently overwhelmingly approved Proposition 215. They have so far succeeded in this goal, obtaining both an injunction and a contempt order without confronting a jury, and without any of the other protections that would have been afforded to OCBC members in a criminal trial.

Clayton Act). Congress passed §21 of the Clayton Act in direct response to the outcry:

> There had been much complaint that a jury trial, to which an accused was entitled if the thing charged against him was a crime, would be denied him if it was called a contempt. Congress felt that substantial rights should not depend upon what appeared to many to be nothing but a play upon words.

Taliaferro v. United States, 290 F. 906, 910 (4th Cir. 1923).[9] Section 21 contains an exemption for actions brought by the United States, but Congress provided for a jury trial in many such actions by including provisions like §882(b) in individual statutes.

Given this history, it would be anomalous to suggest that the inclusion of a civil jury trial provision in §882(b) was meant to strip the district court of all discretion to con-

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[9] The legislative history of §21 confirms this impression:

> That complaints have been made and irritation has arisen out of the trial of persons charged with contempt in the Federal courts is a matter of general and common knowledge. The charge most commonly made is that the courts, under the equity power, have invaded the criminal domain, and under the guise of trials for contempt, have really convicted persons of substantive crimes for which, if indicted, they would have a constitutional right to be tried by a jury. It has been the purpose of your Committee in this Bill to meet this complaint
> . . . .

H. Rep. No. 613, at 6 (1914)(quoted in Frankfurter & Landis, 37 Harv. L. Rev. at 1055); *see also United States v. Pyle*, 518 F.Supp. 139, 152 (E.D. Pa. 1981)(discussing legislative history); 48 Cong. Rec. 8778 (1912)("The courts have, under the guise of contempt of court, had men arrested and tried for crimes without the intervention of a jury") (statement of Rep. Clayton).

sider the procedural consequences of proceeding by injunction rather than by prosecution. Fairly read, §882(b) represents a due process floor in cases where the exercise of judicial discretion nonetheless leads to issuance of an injunction under the CSA. But nothing in §882(b) suggests that Congress meant to foreclose equity courts from weighing the diminished procedural protections available in a civil contempt proceeding when deciding whether to issue an injunction in the first place. As Congress plainly knew, courts in this country have done precisely that for more than a century.

Specifically, in deciding whether to grant an injunction, courts have traditionally considered procedural hardships that a defendant might encounter in equity, as compared to in a criminal proceeding. *See* "Development in the Law -- Injunction, The Changing Limits of Injunctive Relief," 78 Harv.L.Rev. at 1004 (citing cases); W.E. Shipley, "Injunction as Remedy Against Defamation of Person," 47 A.L.R. 2d 715, at §5(b)(1956)(discussing the reluctance of courts to enjoin criminal libel because of reduced procedural protections in equity); *see, e.g., Heber v. Portland Gold Mining Co.*, 172 P. 12, 14 (Colo. 1918)(refusing to issue an injunction that would "deny one cited for contempt a trial by jury in what is in effect a criminal case"). A congressional intent to cabin this well-established rule of equity would have required a clearer statement than §882 provides. *See Hecht*, 321 U.S. at 329 ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made").

The concern for procedural hardship is most compelling in cases such as this one, where the proposed injunction is coterminous with a criminal statute, where a compelling necessity defense may well exist, and where members of the OCBC have demonstrated an absolute commitment to serve patients in dire medical need who have no alternative medi-

cal treatment. Because OCBC members have a demonstrated determination to serve patients who have a proven medical necessity for marijuana, the risk of future incarceration for contempt is more than hypothetical. Far from automatically issuing an injunction upon a purported violation of federal law, a district court in such a situation should consider the absence of procedural safeguards, both in the injunction proceeding itself and in any subsequent contempt proceeding.

C. The District Court Should Have Considered, As An Equitable Matter, That A Necessity Defense May Not Be Available In A Subsequent Contempt Proceeding

When the district court decided not to carve out an exception to its injunction for cases of medical necessity, it erroneously assumed that the applicability of a necessity defense could be litigated in a future contempt proceeding. *See Cannabis Cultivators Club*, 5 F.Supp.2d at 1102 ("If . . . the federal government alleges that defendants have violated the injunction . . . the Court can determine if the jury should be given a necessity instruction as a defense to the alleged violation of the injunction"). That assumption is, at the very least, subject to question. This ambiguity provides yet another basis for the Ninth Circuit's decision to remand the district court's refusal to modify the injunction to exclude cases of medical necessity. Regardless of whether any such defense is ultimately recognized under the CSA, the district court should have considered, as part of its equitable calculus, the risk that including cases of medical necessity in its injunction might well forever bar litigation of the medical necessity defense.

As a general matter, of course it is well-settled that the validity of a court order cannot be tested in a contempt proceeding unless the injunction is "transparently invalid." *See*

Walker v. City of Birmingham, 388 U.S. 307, 315 (1967); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293-94 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922). Those accused of contempt can argue lack of jurisdiction, *see Ex Parte George*, 371 U.S. 72, 73 (1962), or substantial compliance, *see Balla v. Idaho State Board of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989), or inability to comply, *see Evans v. Williams*, 206 F.3d 1292, 1299 (D.C.Cir. 2000). To our knowledge, however, *no* federal court has allowed necessity as a defense to contempt. The few courts to have addressed the issue have rejected even considering necessity as a defense to violating an injunction. *See, e.g., Zal v. Steppe*, 968 F.2d 924, 929-30 (9th Cir. 1992)(affirming trial court's evidentiary order excluding necessity defense to contempt).

Under these legal circumstances, the district court was wrong to assume, as part of its equitable calculations, that OCBC would automatically be able to litigate its necessity defense in a subsequent contempt proceeding. Instead, it should have considered the serious possibility that such a defense might be barred in a contempt proceeding brought against OCBC members who chose to violate the injunction. The court's judgment that the defense would best be litigated in a more definite factual setting may have been correct, but it should have compelled the court to circumscribe the injunction to allow distribution of cannabis in cases of medical necessity, leaving the defense itself to be litigated in a subsequent criminal proceeding.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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